Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No._____

METRO-GOLDWYN-MAYER INC., a Delaware Corporation, MGM GRAND HOTEL, INC., a Nevada Corporation, and DONN ARDEN,

Petitoners,

vs.

FRANK MUSIC CORP., ROBERT WRIGHT, GEORGE FORREST, ANNE LEDERER (as Executrix of the Will of Charles Lederer), LUTHER DAVIS, and EDWIN LESTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The issues presented by the petition are specious.

Petitioners seek review by this Court of a Ninth Circuit decision awarding interest on profits from copyright infringements in this fourteen year old case arising under the Copyright Act of 1909, which decision the Court of Appeals expressly limited to the old 1909 Act - long ago superseded by the Copyright Act of 1976. Petitoners assert an alleged conflict with a Sixth Circuit decision under the 1976 Act as grounds for certiorari. No such conflict exists.

Petitioners also seek to set aside the apportionment of the profits from the infringements on the alleged ground that the Court of Appeals indulged in appellate fact finding and so far departed from accepted and usual judicial proceedings as to warrant the exercise by this Court of

its supervisory powers. This claim, likewise, is without merit. The Ninth Circuit here affirmed the factual findings of the district court, as not being clearly erroneous, and, following established procedure under all the precedents, modified the apportionment and award to conform to the factual findings of the district court.

While the petition contains numerous incorrect statements, Respondents will not burden this brief, or the Court at this time, with responses, except where it appears to be necessary to the opposition.

Respondents respectfully submit that Petitioners' unhappiness with the award is no ground for a request that this Court use its valuable time to review it; and that the petition is frivolous and should be summarily denied.

STATEMENT OF THE CASE

Respondents (hereinafter "plaintiffs") can not accept Petitioners Statement of Facts which, for the most part, recites, with argument and conclusions based thereon, testimony of defendants' witnesses which is either irrelevant or was directly rebutted by other evidence and thoroughly discredited by the findings of the district court to the contrary, while completely ignoring the relevant court findings.

A. BACKGROUND

Respondents (hereinafter,"plaintiffs") are the authors and copyright owners of the well known, Tony Award winning Broadway dramatico-musical play "Kismet".

In 1955, defendant, and Petitioner, Metro-Goldwyn-Mayer Inc. (MGM Inc.) produced and exhibited a musical motion picture version of plaintiffs' "Kismet",

pursuant to license under a 1954 contract with plaintiffs which reserved to plaintiffs the live stage rights and prohibited MGM Inc. from using any of the musical compositions from the musical play except in connection with the exhibition of its musical motion picture made under the license from plaintiffs.

From April 24, 1974 through July 16, 1976, defendants (Petitioners herein) produced and presented an act entitled "KISMET" (hereinafter "Act IV 'KISMET") as part of a live revue on the stage of the Ziegfeld Theatre at the MGM Grand Hotel in Las Vegas, Nevada. Act IV "KISMET" was one of four production numbers in that revue which were presented as "tributes" to MGM musical motion pictures.

Defendants' publicity and press releases announced the act as "KISMET" and that they were "bringing back KISMET".

The show's program presented it as "KISMET" and listed the five principal characters of the copyrighted work as appearing in the four scenes of their Act IV "KISMET".

As their musical supervisor for ACT IV "KISMET" testified, defendants did not create any original music for Act IV KISMET, and with the exception of some seconds of an insert in plaintiffs' song "Stranger In Paradise" and a 60 second drum solo from a rehearsal record and in the same rhythm and style as that created for the original Broadway production by plaintiffs' choreographer, Jack Cole, all the music was lifted from plaintiffs' original Broadway score which was furnished to him by MGM Inc., either note for note or, in the case of the incidental and cue music to which the performers moved "from one scene to another", as

arrangements or paraphrasing of the material from the original Broadway score. [RT 417, 431-432]

Plaintiffs gave written notice of infringement to defendants immediately upon discovering Petitioners' infringing performances, but, by then, defendants had presented over 400 performances of Act IV "KISMET", at the rate of 15 performances per week. Despite the notice of infringement, defendants would not take a license or cease and desist, but, on the contrary, presented an additional 1300 unauthorized infringing performances until finally ceasing them some three months after plaintiffs filed this action for copyright infringement, unfair competition, breach of contract, breach of covenant of good faith and fair dealing and injunction.

B. THE TRIAL

The case took more than five years to get to trial. At the commencement of the trial the district court, limiting the trial time to 3 1/2 days, refused to hear the pendent contract claims, and the case proceeded to trial only on the copyright infringement and unfair competition claims. (It was not until more than two years after submission of the case that the district court rendered its first decision - dismissing the contract claims for plaintiffs' failure to produce evidence, and awarding $22,000, as plaintiffs' "fair" share of defendants' direct profits from the copyright infringements.)

Defendants offered no expert testimony or other evidence on the issue of apportionment.

Defendants stipulated that it was a

"truism" which did not require any proof, that the revue contributed to bringing in customers to the hotel. P l a i n t i f f s offered, and the district court admitted the relevant MGM Inc. 10K Report to the Securities and Exchange Commission and Annual Reports to the shareholders, in which MGM Inc. stated that the MGM Grand Hotel was a "totally entertainment-oriented structure" and the first Las Vegas hotel to incorporate two major showrooms in its original construction, that "[r]evenue and income from gaming operations depend principally on the volume of gaming activity ...", that the "success" of the showroom entertainment, including the "spectacularly successful" revue, of which Act IV "KISMET" was a part, that played to virtual capacity audiences at each performance, "contributed greatly" to the constant

tourist traffic, and that the "hotel and gaming operations" continued to be "materially enhanced" by the "popularity" of the showroom entertainment. These reports, while referring to the existence of services and accomodations at the hotel other than the entertainment, offered no statement as to any effect, relative or otherwise, of these other services and accomodations on the income of the enterprise.

The Variety (the theatrical trade paper) critic reviewing the show considered the "KISMET" segment to be "overpowering". Defendants chose "Kismet", a "dreamland" of a show for Las Vegas with its harem scenes and inherent nudity, as an "important element" of their show. Defendants' stage manager testified that "the colors and the music, the entire thing made [the "KISMET" sequence] a very

beautiful number." Defendant Donn Arden considered the "KISMET" sequence, with the scenes from "Kismet" with the most "sex appeal for Las Vegas" and the "most familiar music from that score", to be a "very important part" of the show, and he "hated to see it go." Defendants never deleted the "KISMET" sequence from the show although they deleted other production numbers as well as variety acts from time to time either temporarily or permanently. Additionally, each Saturday night, to shorten the show in order to give an extra performance, they would delete one of the variety acts and one of the production numbers - but never the "KISMET" sequence.

C. THE FIRST DECISION (DECISION I)

Reciting, in some detail, defendants' use, in Act IV KISMET, of plaintiffs' musical score, including five of

plaintiffs' songs, and of plaintiffs' major characters, locales, scenes, backdrops, dance styles, staging, costumes and even identical props, and the fact that defendant Arden and his staff were all familiar with the Broadway stage version of plaintiffs' musical play and that they viewed clips of the licensed motion picture version supplied by MGM Inc., the district court found that

> "There can be no doubt that defendants' production combined performances of plaintiffs' musical score with visual representations of plaintiffs' dramatico-musical play", [and it is] clear that [Act IV] was intended to and did in fact recreate the 'same general flavor and look' as [the licensed movie version of plaintiffs' "Kismet]."
>
> [Decision I, pp. 10-11; Petition, Appendix A, pp. 11a-12a]

The district court further found that Act IV KISMET was a virtually identical copy of the same scenes in plaintiffs' play, as follows:

"In the instant action there is literal similarity between Act IV and substantial portions of plaintiffs' dramatico-musical play. The five musical numbers with lyrics performed in Act IV were essentially identical to five songs from plaintiffs' musical play. Each of the five songs in Act IV was performed by a character of the same name as the character that performs that song in plaintiffs' play. Moreover, each of the five songs in Act IV was performed in a setting essentially identical to the setting in which it is sung in plaintiffs' play. Finally, even the staging of a number of the songs in Act IV was identical to the staging of the songs in plaintiffs' play ..., [and] the songs combined with characters, locale, scenery, props and settings do constitute a substantial portion of that play."

[Decision I, pp. 15-16; Petition, Appendix A, pp. 16a-17a]

"Defendants herein have used plaintiffs' characters not to tell a new and different story, but to perform plaintiffs' songs in the same locale, same settings, and with substantially similar costumes, scenery, and props as are found in plaintiffs' work.

[Decision I, p.16; Petition, Appendix A, p. 17a]

"The similarity between the two works at issue, although not comprehensive,

> is quite literal and relates to a substantial portion of plaintiffs' work."
>
> [Decision I, p. 17; Petition, Appendix A, p. 18a]

The district court also found that the dance music style of Act IV KISMET was "precisely the same" as that developed by plaintiffs' choreographer, Jack Cole, for their original Broadway production, and that even the costumes of Act IV KISMET were "designed to recreate the original copyrighted work". [Decision I, p.10-11; Petition, Appendix A, pp. 12a-13a] The district court concluded that

> "there can be no doubt that defendants' production combined performances of plaintiffs' musical score with visual representations of plaintiffs' dramatico-musical play ... in violation of the plain language of paragraph 3 of the ASCAP license [asserted by defendants in defense of their actions, which] provides that musical works cannot be accompanied by visual representations of the dramatico-musical play from which the music is taken;"
>
> [Decision I, pp. 10-11,;

Petition, Appendix A, pp. 11a-12a, 14a footnote 5]

and held that defendants had infringed plaintiffs' separate copyrights not only in the musical score, and in the individual songs, but in the book of the musical play "Kismet" as well, [Decision I, pp. 12 (and endnote 5 on p. 31), Petition, Appendix A, p. 13 a, and footnote 5 on p. 14a] and, as above stated, awarded plaintiffs $22,000 as their "fair" share of the MGM Grand direct profits from the revue and a "just" award.

D. THE SUBSEQUENT COURSE OF THE CASE

On the first appeal, the Court of Appeal, inter alia, affirmed the holding of infringement; reversed, as clearly erroneous, the finding that defendants had proved their claimed overhead; vacated the award as being "grossly inadequate"; and directed the district court to include ascertainable indirect profits from the

infringements in the apportionment. [Frank Music Corp. vs. Metro-Goldwyn-Mayer Inc., 772 F.2d 505 (9th Cir. 1985) (Frank Music I]

On remand, the district court granted defendants' request for a new trial on the two issues they had lost on the appeal (overhead and indirect profits) and to present evidence, for apportionment purposes, on the importance of services offered by the hotel, other than the entertainment, that they claimed also contributed to the overall profits - thereby offering defendants a chance to try again on all those issues where they failed in the trial.

On plaintiffs' consequent (second) appeal, petition for writ of mandamus, and motion for clarification, the Ninth Circuit clarified its Opinion, reiterating that the evidence did not support a claim

of overhead, that the nexus between the entertainment and the gaming casino operation and its profits had been established in the trial and was not to be retried, and that the district court was to recalculate and apportion profits on the existing record.

The district court thereupon, and without the benefit of any of defendants' proposed evidence on apportionment, held that the entertainment presented by the MGM Grand Hotel accounted for only 5% of the profits from the hotels gaming and other enterprises (other than the entertainment itself), that only 2% could be attributed to the musical revue containing the infringing act, that only 10% of that 2% could be attributed to Act IV KISMET, and that 75% of the profits from Act IV KISMET must be given to the infringers - Petitioners herein, for

"original material" contributed by their

> "composers, choreographers, costume designers and others who participated in creating Act IV [KISMET], and the attraction of the unique Ziegfeld Theatre with its elaborate stage effects,"

"trust[ing]" that the amount awarded upon the allowance of only 25% of the infringing work to the authors and copyright owners must have been "adequate" because it was fifteen times the (grossly inadequate) $22,000 originally awarded. [Decision II, pp. 4,7; Petition, Appendix D, pp. 64a, 67a]

On the third appeal, the Ninth Circuit, inter alia, affirmed the factual findings of the district court and its attribution of only 2% of the indirect profits to the musical revue as not being clearly erroneous, but modified the apportionment of the infringing act itself and consequent award of only 25% of its profits to plaintiffs, as in conflict with

the very findings of the district court in its Decision I as to the extent of the infringements, noting that defendants had conceded that it would have been proper for the district court to have awarded 100% of their profits to plaintiffs, despite their own creative efforts, had they presented plaintiffs entire play instead of just a substantial part of plaintiffs' work, and noting also that

> "a producer's ability to stage a lavish presentation ... is not a license to use freely the copyrighted works of others."
>
> [Frank Music Corp. vs. Metro-Goldwyn-Mayer Inc.886 F.2d 1545,1549 (9th Cir. 1989) (Frank Music II); Petition, Appendix E, p. 78a]

The Court of Appeals apportionment here allocated to plaintiff copyright owners total damages of only 31/100 of 1% of the aggregate of defendant MGM Grand Hotel's direct ($6,131,606) and indirect ($388,868,394) profits from the

infringements, plus interest thereon only from the time that defendants finally ceased their infringing peformances.

Defendants, unhappy with the apportionment and the interest award, now petition for certiorari.

ARGUMENT

A. IN APPORTIONING THE PROFITS, THE NINTH CIRCUIT FOLLOWED ESTABLISHED PRECEDENT AND USUAL AND ACCEPTED JUDICIAL PROCEEDINGS

Like in many other cases brought before this Court where there is no meritorious ground for review, the petition here throws out the catchall claim that the appellate court has indulged in fact finding, has departed far from usual and accepted judicial proceedings, and must be held in check by this Court's exercise of its supervisory

powers.

Modification by appellate courts of damage awards is hardly unknown, including in copyright infringement cases.

In modifying the apportionment made by the district court here to conform with the district court's own findings, the Court of Appeals, as petitioners must know, has not departed from the accepted and usual judicial proceedings established by the precedents in the field, all three of which precedents defendants cited and relied on in the appeal below, and two of which they have cited in their petition to this Court.

In Sheldon vs. Metro-Goldwyn Pictures, 26 F.Supp. 134, 106 F.2d 45, aff'd. 309 U.S. 390 (1940), the Court of Appeals, holding that "the defendants must be content to accept much of the embarrassment resulting from mingling the

plaintiffs' property with their own," and, refusing "to accept the experts' testimony [from nothing to 12%] at face value", fixed plaintiffs' share for the contribution made by the material from their play in the motion picture at 20% of the profits from the motion picture, as "a figure which will favor the plaintiffs in every reasonable chance of error." [106 F.2d at 51] This Court, on appeal from the decision of the Second Circuit, affirmed the apportionment made by the Court of Appeals, which, this Court said, made "the best estimate it could 'which will favor the plaintiffs in every reasonable chance of error'", (309 U.S. at 398)

In Sygma Photo News, Inc. v. High Society Magazine, Inc., 778 F.2d 89 (2nd Cir. 1985, the Court of Appeals, finding that the district court "gave in our

opinion too much weight [to certain expert testimony]", modified the award of the district court, fixing the apportionment to the infringing cover at 50% of the profits of the magazine instead of the percentage fixed by the district court, and "remanded to the district court for entry of a modified judgment revised as to damages in conformity with this opinion."

In Orgel v. Clark Boardman, Co, 301 F.2d 119 (2d Cir. 1962), the Court of Appeals, rejecting the diverse conclusions of both the Special Master and the district court, stated that, "[based on the importance of the infringing chapter of the book] we feel that it is reasonable to allow 50% of the profits to the infringing material, although that makes up but approximately 35% of the defendants' complete work", ordered the judgment modified in accordance with its

opinion, and affirmed it as modified.

Respondents are unable to find any cases, and petitioners have cited none, where the modification by a Court of Appeals of a district court's apportionment of copyright infringement profits has been held to be improper procedure. The Ninth Circuit here has not departed from the usual and accepted judicial proceedings.

See also, e.g., Playboy Enterprises, Inc. v. Baccarat Clothing Co, Inc., 692 F.2d 1272 (9th Cir. 1982) (a trademark infringement case) where the Court of Appeals vacated the district court's award of 10% of the profits from the sale of jeans pants bearing the infringing label, on the ground that the award was inadequate to deter infringement, and, increasing it ten fold, ordered the district court to award to plaintiff all

of defendants' profits from the sale of those pants; and Eazor Express, Inc. vs. International Brotherhood of Teamsters, etc., 520 F.2d 951 (2d Cir. 1975), cert, den. 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976), where the Court of Appeals substantially increased the damages awarded by the district court in a Labor Relations Management Act case.

B. PREJUDGMENT INTEREST

1. No conflict exists among the Circuits.

Petitioners' attempts at making it appear that their exists a conflict between this Ninth Circuit decision and the Sixth Circuit decision in Robert R. Jones Associates, Inc. vs. Nino Homes, 858 F.2d 274 (6th Cir. 1988) are all predicated on the violent assumption, and assertion, repeated in every conceivable

way throughout the petition, and then backed away from even by petitioners, that the Ninth Circuit held an award of prejudgment interest to be "mandatory", and "required" in every case under "the Copyright Act". That assumption and assertion is not tenable in light of the language of the Ninth Circuit holding, as follows:

> "We ... hold that prejudgment interest is an available remedy under the 1909 Act. Whether the circumstances of this case warrant the remedy is a separate question."
>
> [Frank Music II, supra,, 886 F.2d 1545,1551 (9th Cir. 1989); Petition, Appendix E, p. 83a)

Just as did the Ninth Circuit here, each Court of Appeals that has ruled on the issue of prejudgment interest in a copyright infringement case has acknowledged that it is an available remedy.

In Lottie Joplin Thomas Trust v. Crown

Publishers, Inc. 456 F. Supp. 531, aff'd. 592 F.2d 1184 (2d Cir. 1978), the Second Circuit affirmed without discussion an award of prejudgment interest in a case arising under the 1909 Copyright Act.

In Nino, the Court of Appeals acknowledged, as correctly stated by petitioners, that prejudgment interest is available in copyright infringement cases where the total award would otherwise be insufficient to satisfy the purposes of the Copyright Act. (Petition, p. 23)

Although expressly limited to the 1909 Act, whereas Nino was decided under the 1976 Act, the Ninth Circuit decision here is, nevertheless, in harmony with Nino, as holding prejudgment interest to be an available remedy where the damage award would otherwise be insufficient to satisfy the purposes of the Copyright statute.

In any event, the case at bench, still

in litigation in 1990 after some fourteen years, presumably is and will be the the last case to be decided under the old Copyright Act of 1909 which was so long ago superseded by the Copyright Act of 1976.

2. In holding that prejudgment interest should be awarded in this case, the Ninth Circuit did not depart from usual and accepted judicial proceedings.

Petitioners argue that the Ninth Circuit had no authority to hold that prejudgment interest should be awarded in this case because "[p]laintiffs never raised the issue of whether prejudgment interest is an available remedy in an action for copyright infringement in the DIstrict Court." (Petition, p.20, and footnote 7 on p. 12)

Petitioners' statement is just not correct. Plaintiffs did raise the issue

in the district court, specifically in their Memorandum of Contentions of Fact and Law, [CR 115, p. 33, Contention of Law No. 58] and it was included as an issue in the Pre-Trial Conference Order. [CR 158, p.18, Issue of Law No. 43]

The district court failed to exercise its discretion on the issue placed before it. The granting of prejudgment interest for violations of federal statutes in the absence of an unequivocal prohibition, is within the equitable power of the Court to be based on the Congressional purpose in imposing those statutory obligations and in light of general equitable principles of fairness and balancing of the equities. [Rodgers v. United States, 332 U.S. 371,373, 68 S.Ct. 5,?, 92 L.Ed. 3 (1947); Waite v. United States, 282 U.S. 508, 51 S.Ct. 227 (1931) (Court of Claims denied pre-judgment interest and this Court

reversed); Wessel v. Buhler, 437 F.2d 279,284 (9th Cir. 1971)] Accordingly, the holding by the Court of Appeals that prejudgment interest is necessary in this case to adequately vindicate the purposes of the relevant Copyright statute was an appropriate ruling under the circumstances here, and is consistent with accepted and usual judicial procedures, with the policy of this Court as to prejudgment interest in cases involving violation of federal statutes, and with the other appellate cases involving prejudgment interest on damages for copyright infringement.

CONCLUSION

The petition is specious, based on false premises, and should be summarily denied.

If, for some reason this Court should grant certiorari to review the findings

and holdings in this case, Respondents would argue that many of the findings and conclusions affirmed or accepted in this case, not complained of by Petitioners, were clearly erroneous and against the law, to Respondents' considerable detriment. However, Respondents, who range in age from approximately 75 to approximately 95 years old, are willing to accept the apportionment and award as it now stands and are anxious to proceed in the district court with the further proceedings in accordance with the opinion of the Court of Appeals, to the end that this seemingly endless litigation brought and decided under the Copyright Act of 1909 and concerning obvious and massive infringements that commenced sixteen years ago, can soon be finally disposed of. It is for that reason that Respondents have not filed a cross-petition herein.

In any event, for the reasons set forth above, the Petition is without merit and should be summarily denied.

DATED: January 20, 1990

Respectfully submitted,

DAVID H. KORNBLUM
Attorney for Respondents

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1340 Sierra Alta Way, Los Angeles, California 90069.

On January 22, 1990, I served the within Brief in Opposition to Petition for Write of Certiorari in re: Frank Music Corp., et al, vs. Metro-Goldwyn-Mayer Inc., et al, in the United States Supreme Court, October Term 1989 No. _____, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Charles M. Stern, P.C. and W. Paul Baskett
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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22, 1990, at Los Angeles, California.

_____
David H. Kornblum